



Climate Change Advisory Council

Appendix to Letter re: Climate Action and Low Carbon Development (Amendment) Bill 2020

18th November 2020

1. Background

This Appendix discusses and offers advice on the recently published draft Climate Action and Low Carbon Development (Amendment) Bill 2020 ('the Bill'). The Bill (once enacted) will amend the Climate Action and Low Carbon Development Act 2015 ('the 2015 Act'). The Bill also amends the "National Oil Reserves Agency Act 2007".

2. Discussion

This section considers a number of key themes from the Bill, discussing their potential implications and makes recommendations where appropriate.

2.1 General comments

The final text of amendments to the Act would benefit from editing to be more concise and purposeful. Much of the draft text might be included in the preamble and explanatory texts and given mandate through more concise text in the actual legislation. Some specificities might be more appropriately omitted or addressed in secondary legislation. For example, Section 12(1)(a) provides that the Advisory Council shall conduct the Annual Review by 15 September in each year of the progress made during the "immediately preceding year". While there may be benefits to stipulating a date or indeed suggesting an earlier one, it must also reflect that some of the core data necessary for timely and relevant analysis and review is not available until mid-April.

It is noted that there are also areas, however, where more detail or clarity is required on important issues.

The final Act will need to be flexible to be able to reflect developments at International and EU level to avoid the need to revisit the legislation at a later date. Ireland has the ability to



define its own emissions reduction target which should be ambitious and in line with best available science and our status as a developed economy, but at a minimum we must meet our obligations under EU law, which are likely to be revised through negotiations under the more ambitious emissions reduction targets to 2030 proposed by the EU Commission.

2.2 Climate governance

During the discussion at the Oireachtas Committee it has been noted that the Bill appears to weaken the commitment to achieve the overarching climate objectives. The language changes from “**to pursue, and achieve,**” to simply “pursue”.

*“The State shall **pursue** the transition to a climate resilient and climate neutral economy by the end of the year 2050 (in this Act referred to as the ‘national 2050 climate objective’).”*

The Council recommends the language with regard to the new 2050 objective should retain a similar level of commitment conveyed in the “to pursue, and achieve” language adopted in the Act.

The proposals with respect to the Climate Action Plan would appear to create a weaker instrument than the National Mitigation Plan. The mandated reporting is weaker. It is not clear whether the Plan is subject to the same public consultation and the requirements of the SEA and Habitats Directives. The Climate Action Plan is defined explicitly as a roadmap to the long-term goal rather than a plan as such (despite its title).

The existing Climate Action Plan 2019 is more than a roadmap, and as such overachieves what would be required under the Bill. The Bill only requires “updates” to the Climate Action Plan, and it is unclear what legislative status an update would have. The Council believes, following the Supreme Court decision in Appeal No 205/19 (31 July 2020), that future Climate Action Plans should maintain the existing legislative provisions for National Mitigation Plans while adopting the enhanced action, and governance and implementation structures, seen in the Climate Action Plan 2019. Climate resilience is part of the proposed national 2050 climate objective, but closer consideration should be given to how adaptation and the 5 year National Adaptation Framework process links to the long term strategies and particularly the annual climate action plans. It remains important that adaptation is mainstreamed in the other plans, processes and climate governance. The long-term strategy and annual climate plans, as presented, only relate to the mitigation element of the 2050 objective.



2.3 Carbon budgets

Carbon budgets need to be grounded in solid, thorough, research and analysis, so sufficient resources need to be given to the task, along with sufficient time, particularly for the first set of three carbon budgets.

The level of detail and nature of the carbon budgets is unclear. The Bill outlines that the Minister will set sectoral decarbonisation ranges. It may be that the Bill envisages that the Council only prepares a very high-level carbon budget for the whole economy while the Minister does the detailed work of allocating the budget by sector in each five-year budget period. However, to determine the appropriate time-path for decarbonisation, to be embodied in the carbon budgets, it would be necessary to consider the effects of such a time path on different sectors, the cost of compliance and the benefits arising from earlier action. Thus, the research necessary to undertake even a high-level budget allocation would also be an essential underpinning for the decisions on allocating the carbon budget across sectors. This means that it would not be easy to separate decisions on the high-level carbon budgets from decisions on how the budget would be allocated across sectors.

Value for money/net benefits to society is not on the list of criteria for the Council in developing a budget proposal, while it is on the list of criteria for the Minister in setting the budget and in the subsequent process of setting sectoral decarbonisation target ranges. If this is the intention, then the detailed carbon budget and sectoral decarbonisation target ranges should be considered by the Council - something that is not envisaged in the Bill.

When comparing the mandated list of criteria for the Council to consider in developing carbon budgets S. 3(3)(a)-(d) and 6A(6)(a)-(b) to the list of criteria S.3(3)(a)-(y) which the Minister shall use to decide on a carbon budget to put to the Oireachtas, it could be suggested that the Minister has 21 potential reasons to reject the Council budgets. This may lead one to question the value of the Council preparing carbon budgets.

The list of criteria for the Council to take into account when developing proposed budgets excludes considerations of feasibility and cost which are included in the Minister's list of criteria. This constraint on Council deliberations may make it more likely that budgets proposed by the Council would not be accepted by the Minister. For example, how could the Council propose a budget without consideration of whether Carbon Capture and Storage is or is not a feasible technology in the timeframe under consideration? Furthermore, cost is an



important issue to consider in setting budgets, taking into account external costs such as air quality synergies or trade-offs; how costs impact on different segments of the population etc. A useful consideration of just transition or climate justice is hard to conceive without having a proper analysis of the costs implied in different carbon budget levels.

The designation that the 3rd budget period and subsequent 'new' budgets as 'provisional' for 5 years is very unusual in carbon budget law. There are general provisions in the Bill for revisions of budgets in response to changes in science, changes in international obligations and due to use of banking/borrowing – this is common practice internationally. However, as drafted, provisional budgets could be subject to change for any reason or none. This reduces the policy certainty that a 15 year budget cycle is supposed to create (reducing the policy certainty down to 10 years or less). The Council is not aware of any other climate law which makes this distinction between carbon budgets.

A number of the criteria set down in the Bill are not defined. For example, it is difficult to consider how to take climate justice (as required under S.3(3)(c)) into account in setting carbon budgets without being provided a definition.

Drawing up robust carbon budgets requires working with detailed models of different sectors of the economy, to be able to explore the implications of different pathways, scenarios and policy interventions. The Council does not have access to these models at present and this would be a prerequisite for the Council to perform this statutory duty.

The timelines for development of carbon budgets proposed in the Bill is impractical. If we look at other jurisdictions, Councils/Committees were given in excess of a year to develop the first set of carbon budgets. In this case, the Council is being given less than three months from the publication of the heads of the Bill, without knowing what the final text of the Act will contain. Other timelines in the Bill for consultation of the Minister with the Council are also incredibly short. If a carbon budget is not accepted by both Houses of the Oireachtas, the Minister must within 2 months; consult with other Ministers, consult with the Council and either amend and resubmit the carbon budget to the Oireachtas or outline reasons for not amending. The practical implications for the Council to respond to such an important and potentially complex request in a very short time frame will be hard to manage.

It is difficult to determine the final resource requirement, particularly while awaiting the final amendment text. The practical implications of the incredibly short time-frame, determining



resource requirements and then requesting and securing those resources severely impacts on the Council's ability to deliver this work package within the outlined timeframe.

Council Recommendation: If the Council is mandated to develop economy-wide carbon budgets, the Council recommends that it should be mandated to take into account cost and feasibility in different sectors in developing those budgets. The Council also recommends that no budget for any period should be designated as provisional. The Council recommends that the timelines be reconsidered as the Council will require at least a year, from enactment of the Bill and allocation of appropriate resource, to develop the first set of three carbon budgets.

Sectoral decarbonisation target ranges

The Council is concerned about the proposal in the Bill to adopt sectoral decarbonisation target ranges in order to implement carbon budgeting. The 'decarbonisation target range' means the target range of greenhouse gas emissions that are permitted in different sectors of the economy within the limits specified in the carbon budget. It is important that this approach includes measures to ensure accountability. While clearly the carbon budgeting process needs to be sufficiently flexible to take new circumstances into account, it is important that the minimum ambition level for each sector sum to the carbon budget set for the whole economy.

Council recommendation: The Council recommends that it should be consulted on sectoral decarbonisation target ranges prior to their adoption by Government.

2.4 Climate Change Advisory Council

The text is very specific in places. This may constrain the Council in both its operations and procedures. A number of areas in which this occurs are outlined below.

For example, the Council is required to advise on the preparation of a Climate Action Plan (S. 11(1)a). But there is no requirement on the Minister to prepare a Climate Action Plan under the amended Act, only to update the existing Climate Action Plan. Greater clarity on the proposed functions of the Council would be useful.

For example, the Act setting up the New Zealand Climate Change Commission begins the relevant section as follows:

The purposes of the Commission are:



- (a) to provide independent, expert advice to the Government on mitigating climate change (including through reducing emissions of greenhouse gases) and adapting to the effects of climate change; and*
- (b) to monitor and review the Government's progress towards its emissions reduction and adaptation goals.*

Council recommendation: The Council recommends that a general statement of the functions of the Council be included in Section 11.

2.4.1 Governance

The Bill under S.9(14B) and S.9(14C) would appear to impose a simple majority voting procedure for 'Every question at a meeting of the Advisory Council'. While, the intention of the proposed legislation is to provide structure to the procedures of the Council, in practice this may have adverse impact on how the Council would operate.

The mandate for majority voting on "every question at a meeting" appears in many statutes and similar documents (such as standing orders) and it means the matters which are for decision by the Advisory Council, which will usually be set out in the board papers circulated in advance of meetings. However, this mandate runs counter to the current approach of Council which seeks to achieve consensus on issues in the first instance. Obliging a formal vote undermines this and may discourage discussion and consideration of minority opinion on the Council and engender division rather than coalescing of views.

Where specific questions are voted upon, it is unclear whether the intent is that the vote of each member present is recorded. This could be problematic as it would undermine the authority of Council advice and may lead to targeting of individual Council members by lobbyists or special interest groups who may disagree with positions taken.

Council recommendation: The procedures of Council meetings should be open and transparent, but the Council recommends that it not be imposed in legislation.

2.4.2 Membership

The Council welcomes the proposal to introduce a greater level of diversity into the membership of the Council. However, the listed expertise required of Council members in S.9(4) under the Bill could be exclusionary as currently drafted. It makes no reference to



expertise in adaptation and resilience, or to engineering disciplines or practices. The Bill does not recognise expertise beyond academic or policy arenas.

There was discussion at the Oireachtas Committee to include 'representation' from diverse stakeholders e.g. youth and trade unions, on the Council. The Council believes the role of a representative advisory body is different from that of an expert advisory body. The Climate Change Advisory Council should comprise people with a range of different expertise.

The Council has found it valuable to have international expertise at the table and the Bill should not exclude this possibility.

Council recommendation: The Council recognises the need for appropriate expertise on the Council but recommends less specific wording in the legislation to avoid exclusion of possible important areas of expertise.

2.4.3 Deliverables

There are a number of additional tasks implied in the Bill that could overload the Council and dilute the impact of its work. These are not necessarily something that additional resourcing can address, as they also raise practical issues around timelines. Adopting a less prescriptive approach to consultation in the Bill may assist with this.

For example, while acknowledging the importance of early consultation with the Council, the Bill requires, in practice, the Minister and then separately, the Government, to consult with the Council on the update of the Climate Action Plan every year. While at the same time the Council is also required to review the most recently approved Climate Action Plan in its Annual Review. This effectively would be three rounds of Council deliberation on the same Plan, which could be burdensome without necessarily adding value.

Furthermore, the requirement for the Council to consider the latest approved Climate Action Plan in the Annual Review (on the basis the 25 criteria set out in S.3(3)(a)-(y)), alongside existing mandated elements and the addition of reporting progress in carbon budgets may make the process of developing the Annual Review very unwieldy.

A practical concern is that in providing advice on any topic, the Council will be required to demonstrate (probably through documentation) how it addressed each of the 25 criteria and the result. Otherwise, the Council could be exposed to judicial review as not meeting its legislated mandate.



The existing Act (S.11) is unclear as to circumstances and procedures by which the Government, Minister, and Ministers shall seek advice of the Council during the development of climate policy. The Amendment Bill is an opportunity to resolve these questions.

Council recommendation: The Council believes that the list of criteria is too long. Council recommends that its deliberations should be based on a set of principles rather than a long mandatory list of criteria. The Council recommends that consultation by Government with the Council should be streamlined so that the Council is afforded sufficient time for its deliberations. Only one *ex ante* consultation on a given policy or plan should be mandated.

2.5 Biogenic methane

The underlying concept for criteria S.3(3)(y) as regards consideration of biogenic methane is sound, i.e. the scientific consensus which has emerged with respect to the requirement for a reduction in global methane emissions, and the role of biogenic methane in this effort. However, the explicit reference to the IPCC 1.5 report is not valid, as the report does not make reference to biogenic methane, this actually appears in the IPCC AR5 2013.

It is very unclear how biogenic methane should be treated by Government, Minister(s) and the Council in their deliberations on carbon budgets, policy development and annual review of progress.

In 2019 the Council recommended a separate target for methane. Discussion at the Oireachtas Committee suggests that the language in the Bill leaves open the option for a separate target for biogenic methane. However, this is not explicit in the Bill, and requires a very close reading of a number separate provisions to take this view, specifically;

- section 3(3)(b) policy of the government on climate change (which could in future include a target for biogenic methane)
- section 3(3)(y) the distinct characteristics of biogenic methane
- section 2 (a) the definition of climate neutral economy *means a sustainable economy, where greenhouse gas emissions are **balanced** or exceeded by the removal of greenhouse gases*; this could be interpreted as either a balance of accounted emissions or of the climate impact of those emissions (e.g. temperature)
- section 2 (a) the definition of carbon budget *means, in relation to **one** or more greenhouse gases, the total amount of greenhouse gas emissions that are permitted during the budget period*;



These provisions could be read as a very tenuous justification for the Council or a Minister to develop a separate approach to budgeting for biogenic methane. The Council believes the New Zealand Climate Act provides a useful template on how to legislate on biogenic methane.¹

Council recommendation: The Council reiterates its advice to clearly legislate for an approach to carbon budgeting which includes a separate ambitious 2050 target for reduction in emissions of biogenic methane. Provision should also be made for the Council to provide advice on the appropriateness of the target for biogenic methane in the context of future climate action.

2.6 Climate neutral economy

In the draft text a 'climate neutral economy' is defined as "a sustainable economy, where greenhouse gas emissions are balanced or exceeded by the removal of greenhouse gases". This definition does not make clear the scope of emissions included in an assessment of the economy.

It is not clear whether only emissions occurring in Ireland are to be balanced. It is also not clear whether emissions arising from international aviation and maritime activities, which service the Irish economy, are included. More generally, should assessment include emissions associated with the production and distribution of goods and services imported from outside the State. It is worth noting that the Programme for Government, June 2019, includes a commitment to undertake an assessment of greenhouse gas emissions based on consumption.

It is not clear whether the balance is to be achieved by domestic action only nor under what circumstances Ireland could avail of extra-territorial removals generated within the EU or in other countries. It is worth noting that intra-EU trading of removals is proposed under the EU Climate Plan on the basis of certified removals.

The draft Bill does not consider non-territorial emissions or removals associated with consumption in Ireland nor support for climate action in other countries. The Council notes that the recent Danish climate law contains provisions in this regard. A part of the climate act focusing on reducing emissions outside of Ireland's borders could contain the framework

¹ <https://www.mfe.govt.nz/climate-change/zero-carbon-amendment-act>



for a strategy which seeks to reduce global emissions of greenhouse gases, both through domestic initiatives, such as technological development and reduced consumption of imported goods with large climate footprints, or through initiatives in other countries, such as assistance to developing countries.

The greenhouse gases to be covered are not defined. The metrics for aggregating different greenhouse gases are not defined. The greenhouse gases and activities covered under EU processes are clearly defined. It is not clear if it is intended to establish these as the reference gases and adopted metrics agreed at EU level.

The Council should be given the mandate to advise on the rules that will apply to measure progress towards meeting emissions budgets and the 2050 target.

Council recommendation: The Council recommends that the Bill should require the achievement of the 2050 objective. The emissions and removals to be accounted towards the 2050 objective should be clarified.

2.7 Carbon leakage

The definition of Carbon Leakage proposed in the text is not appropriate in the context of national emissions across all sectors. The text appears to be based on a definition in EU policy in the context of the Emissions Trading System.² The IPCC offer more generic text which may be adapted to an Irish context: Carbon leakage can be defined as the ratio of emissions increase from a specific sector outside the country (as a result of a policy affecting that sector in the country) over the emission reductions in the sector (again, as the result of the environmental policy).³

An alternative definition might read:

Carbon leakage can be defined as the emissions increase from a specific sector outside the State as a result of a policy affecting that sector, compared to the emission reductions in the sector within the State.

² 'Carbon leakage refers to the situation that may occur if, for reasons of costs related to climate policies, businesses were to transfer production to other countries with laxer emission constraints. This could lead to an increase in their total emissions.'

https://ec.europa.eu/clima/policies/ets/allowances/leakage_en

³ Reinaud, J., (2008), "Issues behind Competitiveness and Carbon Leakage. Focus on Heavy Industries". IEA information paper.



Council recommendation: The Council recommends that the definition in the Bill should be revised to more appropriately reflect the concerns in this area.

2.8 Offsetting

The Bill does not contain any provisions for offsetting in the event of failure to meet carbon budget limits. The Council advice on this topic was that carbon budgets should be feasible such that offsets are not anticipated to be required. The recent EU Climate Plan published by the European Commission envisages a continued role for emissions trading within the EU to meet the EU 2050 objective of climate neutrality. The possibility of trading is ignored in the Bill.

Other jurisdictions allow offsetting or trading to meet national carbon budgets with special oversight mechanisms/approvals required. The Council notes that a requirement to purchase offsets in the event of not meeting a sector target or carbon budget may act as an incentive for compliance.

Council recommendation: The Council recommends that the Bill should allow for consistency and potential interaction with any future EU regulated trading mechanisms for achievement of the EU climate objective.